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SUBJECT: TELECOMS 1377: SLOW PROGRESS IN MEXICO

REF: STATE 4730

11. (SBU) SUMMARY: Post thanks USTR for this opportunity to comment on telecom concerns in Mexico for the 2009 Section 1377 Review. Turnover in leadership at the Secretariat of Communications and Transportation (SCT), the uncertain authority and independence of the Federal Telecommunications Commission (Cofetel), and effective private sector court action continue to slow progress in the sector. While there is movement on interconnection rates and regulatory challenges to the dominance of Telmex and Telcel, an opening in satellite service is unlikely and action on Nextel Mexico complaints is glacial. Our comments below recap questions in the order posed in reftel. END SUMMARY.

Satellites and the WTO Schedule

12. (SBU) While Mexico's WTO schedule of commitments does not restrict foreign ownership or require concessions for satellite services, the 1995 Federal Telecommunications Law (FTL, last revised in 2006) does. The law opens up foreign direct investment in the sector to a 49% maximum, with mobile telephony exempted from the cap (article 12). The FTL also imposes satellite-specific requirements for bilateral agreements (article 30) and for location of gateway earth stations on Mexican soil (article 57). Mexico's Congress is currently considering legislation to expand foreign direct investment (FDI) in fixed telephony that could supplant article 12 of the FTL, except as it applies to satellites. The bill has fighting odds of passage, but language on satellite services is unlikely, given alleged ghost-writer Telefonica's focus on fixed lines and what Cofetel staff term political sensitivity to national security concerns.

Termination Rates

13. (SBU) Court action continues in line with regulator Cofetel's declared goal of transition to cost-based tariffs and concession-holders' efforts to impede implementation. Ernesto Flores, chief of staff to outgoing Under Secretary of Communications Purificacion Carpinteyro (the Under Secretary resigned under duress in January 2009), believes stays filed by industry will continue to dog progress. Cofetel describes its current position as "waiting for judicial decisions." There are some signs of progress. Incoming Under Secretary for Communications Gabriela Hernandez has called for movement on termination rates in her introductory media engagements. Cofetel introduced a long-awaited Technical Plan for Interconnection and Interoperability in February 2009.

Telcel and Market Power

14. (SBU) The Federal Competition Commission (CFC) issued a preliminary finding in June 2008 that the four major mobile

operators (Telcel, Movistar, Iusacell, and Unefon) all possessed market power over termination rates because they were the solitary providers capable of ending traffic to handsets contracted with them. CFC's finding is a case study in "we're all guilty, so no one is guilty." Once the finding is finalized, recourse to asymmetrical regulation of the four operators is an option. Most industry players, regulators and watchers expect no such action. Flores explains that SCT and Cofetel have limited legal depth compared to the private sector's legal teams and must pick their battles with care.

15. (SBU) CFC narrowed its focus on Telcel in October 2008 with a preliminary finding that Telcel has "substantial power" in Mexican mobile telephony. CFC commissioners agreed this initial finding by split decision, 3 in favor and 2 against. The legal basis for the proceeding is chapter 5 of the 1992 Federal Economic Competition Law (last revised in 2006). CFC conducted its review of the mobile market at the request of Telcel competitor Movistar, the Telefonica subsidiary. The inquest includes but is not limited to termination rates. Telcel filed its rebuttal in December 2008. Eduardo Perez Motta, CFC president, describes the finding as "not a punishment" but "simply a description of (Telcel's) market participation." If CFC finalizes the finding, to Cofetel falls the task of asymmetrical regulation.

16. (SBU) Separately, Cofetel's Technical Plan for Interconnection and Interoperability provides that Cofetel formally identify the operator(s) with the largest number of fixed and mobile users. Said operator(s) will have six months from notification to implement measures specified in the technical plan (article 11), including an annual public

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schedule of interconnection rates subject to negotiation with other concessionaires, installation of necessary interconnection capacity to service demand, disaggregation of bundled services for individual offer, and data-sharing with Cofetel. Injunctions against the plan by operators are likely. Telmex criticizes it as an expropriation of its assets, bad for rural users, and an invitation for other operators to piggyback on its infrastructure. The day following publication, Telmex announced it would reduce infrastructure investment by 30%, citing regulatory uncertainty and the global downturn.

Nextel Mexico

17. (SBU) Nextel Mexico's local service license application, six years outstanding, and its 31 digital trunking license renewal requests, three years outstanding, remain pending for political reasons. Flores is clearly chagrined by the situation and says he has no explanation. Nextel Mexico's vice president for government relations blames a rudderless SCT and claims competitors Telefonica and Iusacell are influencing the regulatory process to shield themselves from competition. Cofetel asserts in official correspondence with the Embassy that Nextel Mexico withdrew its local service application in September 2006 -- a contention Nextel Mexico rejects. Telefonica justifies its refusal of Nextel Mexico short message service (SMS) traffic on grounds that the latter company does not hold the necessary license -- which Telefonica would seem to be blocking. Private sector vigilant enforcement of alleged violations of law not pursued by regulators is a common tactic in Mexico. In January 2009, CFC opened an investigation into Telefonica's denial of SMS interconnection. Cofetel, in receipt of at least two letters from Nextel Mexico on the subject, claims the company has nonetheless not formally presented an interconnection dispute for resolution under relevant definitions in the FTL.

Spectrum Usage Fees

18. (SBU) SCT foresees no changes to spectrum usage fees. With fees set out at the time a concession is granted, this would constitute a revision to the terms under which

companies invested, according to Flores. The Secretariat of Finance (Hacienda) would be the competent authority in any such decision.

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